

1
2 Holger Uhl [OSB#950143]
3 **McCarthy&Holthus LLP**
4 19735 10th Avenue, Suite N-200
5 Poulsbo WA 98370
6 Phone: 206.319.9100 Ext. 8045
Fax: 206.780.6862
Direct: 206.319.9045
Attorneys for First Horizon Home Loan Corporation

7
8
9
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

10 TAMIE RICHARDSON,
11 vs. Plaintiff,
12 First Horizon Home Loan Corporation,
13 Defendants.

Case No. 10-03073

**REPLY TO PLAINTIFF'S RESPONSE TO
THRID SUPPLEMENTAL RESPONSE**

14 COMES NOW the Defendant, First Horizon Home Loan Corporation, by and through its
15 attorney of record, Holger Uhl of McCarthy & Holthus, LLP, and hereby responds to Plaintiff as
16 follows:

17 Defendant responds in opposition to Plaintiff's pleadings as it appears that Plaintiff's Pleading
18 is at least in part a motion for summary judgment with respect to the validity of certain recorded
19 documents.

21 Following this Court's ruling granting in part Defendant's motion to dismiss, the only
22 remaining issue in this matter is whether the non-judicial foreclosure instituted against Plaintiff
23 complies procedurally with the provisions of the Oregon Trust Deed Act. It can no longer be denied
24 that *prima facie* the foreclosure procedurally the Oregon Trust Deed Act was followed and that all
25 necessary documents were recorded. Plaintiff is not likely to concede that directly, but the current
26 necessary documents were recorded. Plaintiff is not likely to concede that directly, but the current
27

RESPONSE IN OPPOSITION
FACTS - 1

McCarthy&Holthus LLP
19735 10th Avenue, Suite N-200
Poulsbo WA 98370
Phone: 206.319.9100 Ext. 8045
Fax: 206.780.6862
Direct: 206.319.9045

1
2 tenor of her arguments regarding the notaries is an implicit admission that the proper documents were
3 recorded. Instead she focuses on the validity of those documents by attacking the notarization of those
4 documents.
5

6 Specifically, she alleges that the Assignment of Deed of Trust, The Appointment of Successor
7 Trustee and the Affidavit of Mailing Notice of Sale are void as those documents were “falsely
8 notarized.” In addition she alleges that the Assignment of Deed of Trust is also void because it was
9 recorded 3 years late and because it allegedly does not reflect a complete chain of title three years late.
10

11 Her arguments do not show that these documents are void or even voidable and Plaintiff’s
12 remaining claim should therefore be dismissed as a matter of law.
13

14 ARGUMENT

15
16 An acknowledgement is a ministerial act. *Clatsop County v. Wuopio*, 95 Ore. 30, 33 (Or. 1920),
17 *Houck v. Darling*, 238 Ore. 484 (Or. 1964). Even if it is performed by an “unauthorized officer” it will
18 not invalidate the document. *Id.* The officer may be liable if he or she neglects her duties, but this has
19 no impact on the validity of the document itself. *Id.*
20

21 1. THE PURPOSE OF THE RECORDING STATUTE IS TO PROTECT THIRD PARTY 22 CREDITORS, NOT BORROWERS THAT ARE IN DEFAULT.

23 The purpose of recording and registries should be emphasized. A recording statute is not a
24 borrower protection statute that should prevent the exercise of contractual remedies against delinquent
25 borrowers. Instead, it is a process designed to provide record notice to third parties, and third party
26 creditors specifically:
27

RESPONSE IN OPPOSITION

FACTS - 2

McCarthy & Holthus LLP
19735 10th Avenue, Suite N-200
Poulsbo WA 98370
Phone: 206.319.9100 Ext. 8045
Fax: 206.780.6862
Direct: 206.319.9045

1
2 [T]he manifest and exclusive object of [the registry act] was to protect third persons from fraud
3 or injury by means of prior secret conveyances. *Moore v. Thomas*, 1 Ore. 201 (Or. 1855)

4 [T]he "meaning of the registry act was to prevent parol proofs of notice, or not notice." *Id.* "Effect
5 ought to be given to this meaning." *Id.* The purpose of recording is to protect third parties (e.g.,
6 subsequent bona fide purchasers or judgment creditors) by informing them there is an encumbrance on
7 the real property. *Security State Bank v. Luebke*, 303 Or. 418, 421, 737 P.2d 586 (1987), *Bliss v. Miller*,
8 119 Ore. 573, 581 (Or. 1926) ("The object of recording a deed is for the protection of creditors and
9 innocent purchasers."). Thus, the primary objective of the recording statutes is to memorialize for the
10 benefit of outside third parties the interests that affect title to real property. *Luebke, supra*. This is done
11 by recording a conveyance of an interest in real property that is in the form of a trust deed with the
12 county recorder. *ORS 93.610, 93.630, 205.130*.

13
14 Once the world is placed on notice, interested parties must undertake further investigation as to the
15 status of the security interest in the real property. Since the borrowers already know there is a security
16 interest and have in fact explicitly granted that interest, the notice provided by the recording statutes is
17 not for the borrowers' benefit. Recording statutes are not consumer protection statutes intended to
18 confer special rights on borrowers. Recording the deed of trust is for the benefit of the Lender and
19 outside third parties.

20
21 Equally, the purpose for recording deed of trust assignments is not for the protection of the
22 borrower as Plaintiff asserts, but to ensure the current beneficial interest holder on a junior trust deed
23 receives a trustee's notice of sale from a priority trust deed in foreclosure "Foreclosing Security
24 Interests (1997 rev. with 2005 cum. supp.) Chapter 2, Trust Deeds, §2.19. It is thus a provision designed
25
26

27 27 RESPONSE IN OPPOSITION

FACTS - 3

McCarthy & Holthus LLP
19735 10th Avenue, Suite N-200
Poulsbo WA 98370
Phone: 206.319.9100 Ext. 8045
Fax: 206.780.6862
Direct: 206.319.9045

1
2 to protect lenders. Plaintiff takes these provisions designed as a shield and seeks to turn it into a
3 weapon to deprive the protected class from exercising its contractual rights.
4

5 **2. A NOTARY DOES NOT NEED TO WITNESS THE SIGNATURE HE OR SHE
6 ACKNOWLEDGES.**

7 The main thrust of Plaintiff's argument with respect to the questioned notarial
8 acknowledgments of the relevant documents is the accusation that the individual notaries did not
9 witness the signatures which were acknowledged. Plaintiff asserts that this is an essential notarial
10 requirement. That is not the case as a matter of law.
11

12 Each of the challenged notarial jurats uses practical identical language. None of those jurats
13 however, assert that the notary in question personally witnessed the signor signing the document.
14 Instead, the notary certified that the signor "acknowledged" that the signature on the document is
15 his/her signature and that he signed this in his/her authorized capacity. A signor does not need to sign
16 before a notary. *Blaisell v. Leach*, 101 Cal. 405, 409(1894). He or she merely needs to acknowledge
17 her signature. This is the proper way of acknowledging documents:
18

19 The requisites of an acknowledgment ... are the personal appearance of the maker, his
20 acknowledgment that he signed it, and the officer's personal knowledge that the maker is the
21 person he purports to be. *Clements v. Snider*, 409 F.2d 549, 550 (9th Cir. Cal. 1969)(referring to
Cal Civ Code Sec. 1185)

22 Oregon statute is consistent. Pursuant to *ORS 194.515* notaries may take an acknowledgment or
23 make a verification, if the person having signed the instrument personally appears before the notary.
24
25
26
27

RESPONSE IN OPPOSITION
FACTS - 4

McCarthy & Holthus LLP
19735 10th Avenue, Suite N-200
Poulsbo WA 98370
Phone: 206.319.9100 Ext. 8045
Fax: 206.780.6862
Direct: 206.319.9045

1
2 There is no requirement for the notary to witness the actual signature.¹ The person making that
3 “acknowledgment” has to be either identified through proper identification or “personally known” to
4 the notary. ORS 194.515(6).² “Personally known” simply means “familiarity with a person resulting
5 from interactions with that person over a period of time sufficient to eliminate every reasonable doubt
6 that the person has the identity claimed.” ORS 194.515(7)³. All signors and notaries were employees
7 of the same companies who worked in the same office and had known each other.
8

9
10 **3. THE CHALLENGED DOCUMENTS WERE NOTARIZED IN COMPLIANCE WITH
OREGON LAW, AND ARE ENTITLED TO BE RECORDED UNDER OREGON LAW.**

11 Documents acknowledged or certified in compliance with Oregon Statute “are entitled to be
12 recorded.” ORS 93.480, *Marks v. Wilson*, 72 Ore. 5, 9-10 (Or. 1914). Oregon gives foreign notarial
13 acts “the same effect under the law of this state as if performed by a notarial officer of this state” if that
14 person is also a notary public or notary in that jurisdiction. ORS 194.555.
15

16 **4. ORS 86.735(1) REQUIRES THE RECORDING OF ASSIGNMENTS OF THE DEED OF
TRUST, NOT RECORDING OF THE TRANSFERS OF THE NOTE.**

17 *A mortgage...may be transferred, either by the endorsement of the note and surrender of its
18 possession, or, if the note is payable to bearer, by the mere delivery thereof, without any formal
19 transfer of the mortgage.* *Schleef v. Purdy*, 214 P. 137, 140 (Or. 1923)(emphasis added). A
20 promissory note is not assigned but is transferred or negotiated. Transfers are generally accomplished
21

22
23 ¹This is also true for Texas and California. See Texas *Civil Practice And Remedies Code*, Title 6., Sec. 121.004., *Cal. Civ.*
24 *Code* §§ 1185, 1188, 1189

25 ²Ibid. See Texas Sec. 121.005, *Cal. Civ. Code* §§ 1185

26 ³*Cal. Civ. Code* §§ 1185 standard is slightly different. It requires “satisfactory evidence” instead of just personal knowledge,
27 which can be personal knowledge, but adds the requirement of absence of evidence that signor is not who he/she
says he/she is.”)

RESPONSE IN OPPOSITION
FACTS - 5

McCarthy & Holthus LLP
19735 10th Avenue, Suite N-200
Poulsbo WA 98370
Phone: 206.319.9100 Ext. 8045
Fax: 206.780.6862
Direct: 206.319.9045

1
2 by endorsement and delivery for the purpose of giving the person receiving delivery the right to enforce
3 the instrument. *ORS 73.0203*. If the note has been converted to bearer paper, it can be negotiated
4 simply by delivery without additional endorsements. *ORS 73.0205(2)*. There is no requirement under
5 Oregon law that any transfer of the note be recorded, and recordation would be inconsistent with
6 ensuring that negotiable instruments are freely negotiable. The note does not confer any interest in the
7 real estate that may be given as security.
8

9 A deed of trust conveys “an interest in real property to a trustee in trust to secure *the performance*
10 *of an obligation....*” *ORS 86.705(5)* . In contrast, the *obligation*, i.e. the promissory note, “sets forth the
11 terms upon which the loan will be made” and “*does not include a mortgage or trust deed* which secures
12 a promissory note.” *ORS 86.150(3)* (emphasis added). *See also* *ORS 82.150(2)*.
13

14 ORS 86.735(1) makes no reference to transfers of a promissory note. The applicable plain
15 language of ORS 86.735(1) unambiguously requires that only “assignments of the *trust deed* by the ...
16 beneficiary” must be recorded in order to properly conduct a non-judicial foreclosure by advertisement
17 and sale. There is no mention in ORS 86.735(1) that an assignment or other transfer of the “promissory
18 note”—as opposed to the Deed of Trust—must be recorded as a property record as part of the non-
19 judicial foreclosure process.
20

21 **5. AN ASSIGNMENT OF THE DEED OF TRUST WAS RECORDED IN COMPLIANCE
22 WITH OREGON STATUTE.**

23 Plaintiff has to concede that an Assignment was recorded. It was the only assignment of the
24 Deed of Trust, and as such the provisions of the statute have been met *prima facie*. However, she now
25 argues that the Assignment was recorded 3 years late and thus violated the Pooling and Servicing
26
27

RESPONSE IN OPPOSITION

FACTS - 6

McCarthy & Holthus LLP
19735 10th Avenue, Suite N-200
Poulsbo WA 98370
Phone: 206.319.9100 Ext. 8045
Fax: 206.780.6862
Direct: 206.319.9045

1
2 Agreement. There is no requirement in Oregon law as to when an Assignment must be recorded,
3 except that it must be recorded before commencement of the foreclosure. There is no dispute that it
4 was recorded prior to the recording of the Notice of Default. The argument regarding the Pooling and
5 Servicing Agreement is a legal red herring.
6

7 **CONCLUSION**

8 Plaintiff and Defendant are parties to a contract. In 2005 Defendant supplied her with the
9 financial resources to build/remodel a house valued by the tax assessor at nearly half a million dollars.
10 She in return promised to repay this loan in monthly installments. She has not kept that promise, but
11 has now enjoyed the benefit of the resources provided by Defendant for six years. For the last two
12 years she has made use of the property and enjoyed its conveniences for free, except for the filing fee
13 for this complaint. She has been given several opportunities by this Court to resolve this matter through
14 negotiations and to amend her pleadings. She has failed to pursue those opportunities and nine months
15 later her allegations remain as meritless as when this case was initiated.
16
17

18 There is a clear record before the Court that shows that contractually Plaintiff was in default of
19 her mortgage obligations and that Defendant had the right to initiate foreclosure proceedings. The
20 record is equally clear that the procedural steps required by Oregon law were followed. Plaintiff's
21 complaint thus should be dismissed. Neither Oregon nor any of the other jurisdictions disqualify
22 documents from recording because of a notary's failure to keep proper log book records. The failure of
23 the notary to keep those records may subject that notary to civil or other liability, but this has no impact
24 on the validity of the instrument. Whether or not a notary complied with all record keeping
25 requirements of his or her position is a matter between that notary and the jurisdiction in which that
26
27

RESPONSE IN OPPOSITION

FACTS - 7

McCarthy & Holthus LLP
19735 10th Avenue, Suite N-200
Poulsbo WA 98370
Phone: 206.319.9100 Ext. 8045
Fax: 206.780.6862
Direct: 206.319.9045

1
2 notary practiced. Oregon law looks to the instrument itself in determining whether it qualifies for
3 recording. *Coates v. Smith*, 81 Ore. 556 (Or. 1916). If on its face it is properly acknowledged it is
4 entitled to be recorded. *Id.* “[O]bvious clerical errors and technical omissions or defects will be
5 disregarded.” *Id.*

7
8 DATED May 23, 2011
9
10

11 McCarthy & Holthus, LLP

12 /s/ *Holger Uhl*

By _____

13 Holger Uhl, Of the Firm

14 Attorneys for First Horizon Home Loan Corporation

15
16
17
18
19
20
21
22
23
24
25
26
27
RESPONSE IN OPPOSITION

FACTS - 8

McCarthy & Holthus LLP
19735 10th Avenue, Suite N-200
Poulsbo WA 98370
Phone: 206.319.9100 Ext. 8045
Fax: 206.780.6862
Direct: 206.319.9045